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FILED
JAN 8 1960
JAMES R. BROWNING, C

No. 550

Supreme Court of the United States

OCTOBER TERM, 1959

JOHN A. HANNAH, ET AL,

Petitioners

vs.

J. A. H. SLAWSON, ET AL,

Respondents

On Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory provisions	3
Summary of argument	7
Argument:	
Introduction	10
I. Congress did not authorize the Commission to adopt rules of procedure which would deny the accused fundamental safeguards of due process	13
II. An attempt by Congress to authorize the Civil Rights Commission to deny Respondents the right of confrontation and cross-examination in such hearings would be unconstitutional	15
III. The arguments of petitioner's brief are fundamentally fallacious and will not stand careful scrutiny	17
Conclusion	23

CITATIONS

Cases:

Greene v. McElroy, 360 U.S. 474 ..... 8, 14, 15, 21, 22

Peters v. Hobby, 349 U.S. 331 ..... 8, 16

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 et seq:

Sec. 2 4
Sec. 5 4
Sec. 7 5

Civil Rights Act of 1871, R.S. §1979, 42 U.S.C. 1938 et seq:

Sec. 1 5
Sec 2 (3) 6
Sec. 6 6

Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. 1975:

Sec. 101 (a) 3
Sec. 104 (a) (1) 1, 3
Sec. 104 (b) 4

Crimes and Criminal Procedure — Civil Rights, 18 U.S.C. 241 et seq:

18 U.S.C. 241 6
18 U.S.C. 242 7

Congressional Material:

House Document No. 398, 69th Congress (1927) 18, 19

Miscellaneous:

Howe, Holmes-Pollack Letters (1946) 12

Paine, Dissertations on First Principles of Government 13

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OPINION BELOW

The opinion of the United States District Court for the Western District of Louisiana is not yet reported. A previous opinion of the district court granting a temporary restraining order to respondents has been reported at 176 F. Supp. 791.

JURISDICTION

The notice of appeal to the Court of Appeals, Fifth Circuit, was filed November 19, 1959. The case was docketed on November 20, 1959. No further action has been taken in that Court. On November 27, 1959, the petition for a writ of certiorari prior to judgment was filed herein. Jurisdiction for this proceedings rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Civil Rights Commission is an agency of the *executive* branch of the Government created by Public Law 315 of the 85th Congress. The act directs the Commission to "investigate allegations in writing under oath . . . that certain citizens . . . are being deprived of their right to vote and have that vote counted by reason of their color, race, religion or national origin; which writings . . . shall set forth the facts upon which such belief or beliefs are based." The Commission is further directed to "submit interim reports to the President and the Congress . . . and a final comprehensive report of its ACTIVITIES, FINDINGS and RECOMMENDATIONS . . . " (Emphasis ours).

This Court must decide (1) whether this executive agency has been authorized by Congress to summon before it public officials and private citizens, who have been secretly charged with violating criminal and civil laws, and require them to testify upon such secret accusations, without according them the traditional safeguards of due

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process — such as notification of the charges and confrontation and cross-examination of their accusers, and (2) can such authority be granted to an executive or administrative tribunal without violating the guarantees of the Constitution of the United States.

STATUTES INVOLVED

The Civil Rights Act of 1957 (71 Stat. 634, 42 U.S.C. 1975, et seq):

> Sec. 101 (42 U.S.C. 1975). Commission on Civil Rights.
>
> (a) Establishment.
>
> There is created in the EXECUTIVE branch of the Government a Commission on Civil Rights (hereinafter called the "Commission")
>
> (Emphasis ours)
>
> * * *
>
> Sec. 104 (42 U.S.C. 1975c). Duties; Reports; Termination.
>
> (a) The Commission shall—
>
> (1) Investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writings, under oath or affirmation shall set forth the facts upon which such beliefs are based;
>
> * * *

(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957.

* * *

The Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, et seq.)

Sec. 2 (5 U.S.C. 1001)

(a) "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the Government of possessions, Territories or the District of Columbia.

(d) Order and Adjudication.
"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. *"Adjudication" means agency process for the formulation of on order.* (Emphasis ours)

Sec. 5 (5 U.S.C. 1004)

Adjudications.

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .

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(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.

Sec. 7 (5 U.S.C. 1006)

Hearings; Presiding Officers; Powers and Duties; Burden of Proof; Evidence; Record as Basis For Decision.

In hearings which Section 1003 and 1004 of this title require to be conducted pursuant to this section.

* * *

(c) . . . . Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

* * *

The Civil Rights Act of 1871 (R.S. §1979, 42 U.S.C. 1983 et seq.)

Sec. 1

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Sec. 2. (42 U.S.C. 1985)

* * *

(3) If two or more persons . . . conspire to prevent . . . any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, . . . or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is . . . deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.

Sec. 6 (42 U.S.C. 1986)

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, . . . shall be liable to the party injured or his legal representatives, for all damages . . . .

* * *

Crimes and Criminal Procedure — Civil Rights (18 U.S.C. 241 et seq.)

18 U.S.C. 241

If two or more persons conspire to . . . intimidate any citizen in the free exercise or enjoyment of any right or privilege secured him by the Constitution or laws of the United States . . . .

* * *

They shall be fined not more than $5,000.00 or imprisoned not more than ten years or both.

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18 U.S.C. 242

Whoever, under color of law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . on account of . . . his color, or race . . . shall be fined not more than $1,000.00 or imprisoned not more than 1 year, or both.

SUMMARY OF ARGUMENT

Having found that the rules of procedure promulgated by the Civil Rights Commission denied appellees the traditional safeguards of "due process", the District Court enjoined the Commission from holding scheduled hearings on charges that certain Louisiana officials and citizens, including appellees, had deprived other Louisiana citizens of the privilege of voting because of race or color. The rules were declared to be ultra vires and unconstitutional insofar as they deprived the accused complainants of the traditional safeguards of due process, such as notification of the charges and confrontation and cross-examination of their accusers. The Court based its opinion on the lack of "explicit" statutory authority for the adoption of such rules.

The judgment and opinion of the Court below was clearly correct. It is a well established rule of Constitutional Law, that, in such cases, the Court should first examine the authority granted the administrative agency. If explicit authorization is wanting, then grave questions involving the constitutionality of statutes and actions of

the Chief Executive should be avoided. *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400.

In the instant case no authority was granted to the Commission to adopt rules which would deprive respondents of knowledge of the charges against them, and confrontation and cross-examination of their accusers. The case of *Greene v. McElroy*, supra, clearly sets these forth as minimum requirements of due process for administrative agencies such as the Commission. There is no essential difference between the Greene case and the instant case.

Not only have such powers not been granted by Congress, but it is clear that such authority could not be granted without violating the Bill of Rights of the Constitution of the United States. The guarantees denied to your respondents are the essence of due process and are recognized as immutable principle of our jurisprudence. The Commission's rules violate our fundamental constitutional concepts. (Cf. concurring opinion Mr. Justice Douglas, *Peters v. Hobby*, 349 U.S. 331, 75 S. Ct. 790.)

On the other hand, a study of petitioners' brief shows that it is based upon a number of patently fallacious concepts. These may be briefly summarized as follows:

I.

Petitioners' chief contention is a classical and historical non sequitur dear to the hearts of all bureaucrats. This is the argument that if certain practices are proscribed or prescribed as rules of agency conduct, any-

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thing not specifically prohibited is thereby authorized. Such reasoning permits petitioners to contend that since Congress required some rudimentary safeguards in the Civil Rights Act, it thereby authorized the Commission to deny all other safeguards to parties hailed before it.

II.

Petitioners have erroneously assumed, as a major premise, that the Commission is an arm or appendage of the Congress and, hence, entitled to all of the privileges and powers of a Congressional committee. However, in truth and in fact, it is nothing more or less than an agency of the executive, performing an administrative function and bound by all of the limitations applicable to such agencies.

III.

Petitioners, without reference to any authority — statutory or otherwise, have injected into this case a novel test to determine when an accused is entitled to "due process." It is based upon a spurious definition of the word "adjudicate." No such standard has ever been recognized by this Honorable Court. Moreover, the basis of this proposed test is a misinterpretation of the term "adjudicate" as used in the Administrative Procedure Act.

IV.

Finally, petitioners assert that, in the past, certain executive and/or Congressional agencies have denied due process of law to parties called before them and, imply that the Commission should, therefore, be entitled to de-

prive complainants of these rights. This argument ignores the fact that the legality of the cited actions has never been tested in Courts of the United States, and that some of these agencies were acting under extraordinary powers — such as the War Powers — which are exempt from customary Constitutional restraints.

ARGUMENT

Introduction

A.

No serious discussion of this case could be safely launched without first noticing the bizarre set of facts confronting the Court.

(1) A body set up to protect "civil rights" and euphemistically called a "Civil Rights Commission" has been apprehended in the compromising act of attempting to deny basic "civil rights" to United States citizens.

(2) The red faced Commission vigorously argues that Congress never intended that it accord ordinary "civil rights" to citizens, since its assigned task of protecting "civil rights" is too important to be hampered by such trivia.

(3) A small group of intransigents, each of whom has been charged with being, and roundly denounced as, "anti-Civil Rights," are stubbornly insisting that the "Commission" recognize the basic "civil rights" of "due process" for anyone called before it.

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Certain, it is, that even the most enlightened "TV" or "comic book" fan would find it quite impossible to determine who are the "good guys" and who are the "bad guys" in this puzzling plot. Perhaps, Dr. Gallup will settle this annoying matter by taking a poll on the question, "Should the Civil Rights Commission recognize 'civil rights'?"

This is the seriocomic background of a case that bids fair to set the tone of our liberties for the dawning decade. The light treatment above accorded is not intended as impertinence, but, rather, as contrast, to better point up the gravity of the issues here involved.

B.

It was because of a strong feeling that grave matters of Constitutional Law and high Government policy should be decided promptly and on the essential merits of the case, rather than on technicalities, that respondents joined petitioners in their efforts to bypass the Fifth Circuit Court of Appeals and get this case up for a final decision. The record will verify that there were no objections of a technical nature and that respondents have waived all such objections. They were willing to waive such advantages, because they are firmly convinced that this case is governed by the opinion in Greene, and especially those high principles of human rights and Constitutional liberties enunciated therein.

C.

Because of the previously noted incongruities, this case will long stand as a monumental, if mute, reminder of a sorrowful warning issued by the late, great Mr. Justice Holmes. In a letter to his friend Pollack, he wrote:

> "The whole collective tendency seems to be towards underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for. I have had to deal with cases that made my blood boil and yet seemed to create no feeling in the public or even in most of my brethren. We have been comfortable so long that we are apt to take it for granted that everything will be all right without our taking any trouble. All of which is but a paraphrase of eternal vigilance is the price of freedom . . . ."
>
> Mark DeWolfe Howe, Holmes-Pollack Letters, Vol. 2, p. 25 (1946)

But, if the issue is as simple as it is here pictured, why then is it being so bitterly contested by petitioners? A simple answer readily suggests itself.

Underlying this whole controversy is the white hot dispute over segregation of the races as practiced through the years in certain states in the South. Respondents are well identified as obdurate Southern segregationists. Their views on this great social controversy are not shared by very many, if any, of those before whom they must lay their cause. No doubt, this was counted upon, to weigh heavily in favor of the Commission. On the other hand,

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respondents are satisfied that, regardless of the background, their cause will prevail, because the issue is clear and the cause is just.

Respondents know that however much disagreement may exist on current social problems, there is universal and wholehearted agreement on the age old and fundamental problem of securing the individual's liberty and personal freedom against dictatorial and authoritarian governmental control.

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."
>
> Thomas Paine, Dissertation on First Principles of Government.

I.

Congress did not authorize the Commission to adopt Rules of Procedure which would deny the accused their Fundamental Safeguards of Due process.

As pointed out in both the majority opinion and the concurring opinion in Greene, cases such as the instant one should be decided upon the narrower ground of "authorization" rather than on the broad and more significant ground of unconstitutionality of statutes and actions of the Chief Executive, where the facts justify such a decision. Certainly this cause falls within this wise judicial policy. Petitioners can not truthfully contend that there has been any "explicit action by law-

makers" empowering the Commission to deny notice of charges, confrontation or cross-examination to accused persons appearing before it. Where no such explicit action has been taken by lawmakers, this Court has repeatedly denied such authority to administrative tribunals.

> "They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see Peters v. Hobby, supra, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators, who, under our system of government, are not endowed with authority to decide them.
>
> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process . . . . These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers even in areas where it is possible that the Constitution presents no inhibition." (Greene v. McElroy, 360 U. S. , 79 S. Ct. 1419.)

Acquiescence or implied ratification is not enough.

The salutary rule of the Greene Case is summarized in the following excerpt:

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"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . . This Court has been zealous to protect these rights from erosion. It has spoken out, not only in criminal cases . . ., but also in all types of cases where administrative and regulatory action were under scrutiny." (360 U.S. , 79 S. Ct. 1413).

Greene and Peters are clearly definitive of the issues involved in this case. The awkward efforts of appellants to differentiate these cases "cannot but make the judicious grieve."

II.

An attempt made by Congress to authorize the Civil Rights Commission to deny Respondents the Right of Confrontation and Cross-Examination in such hearings, would be unconstitutional.

Although this issue was never reached in Greene or Peters, supra, it is submitted that a fair reading of

those cases forces one to conclude that these fundamental safeguards of due process are constitutionally based and cannot be denied short of a change in the Constitution itself. The last quoted excerpt from Greene, is sufficient to illustrate that these are fundamental rights — the birthright of every American citizen. They cannot be altered, abridged or denied without first changing the fundamental law from whence they are derived.

A clear exposition of this point is set forth in the concurring opinion of Mr. Justice Douglas in Peters.

> "With all deference, I do not think we can avoid the constitutional issue in this case.
>
> • • •
>
> "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work — things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain . . . . It is an un-American practice which we should condemn. It deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process." (349 U.S. 350-352, 79 S. Ct. 800-801)

Of course, in view of the fact that there has been no explicit authorization for the Commission's actions

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here complained of, there is no necessity for passing upon this important constitutional issue. It is merely pointed out to show that even if Greene were cast aside, and the petitioners' argument of authority based upon "inference and implication" accepted, the appeal must still be rejected.

III.

The arguments of Petitioners' brief are fundmentally fallacious and will not stand careful scrutiny.

On first reading of petitioners' brief, one is struck by the vast amount of industry and research that must have gone into its production. Also, one is impressed by the superficial plausibility of most of the arguments. On a second reading, one begins to wonder why — with all of the study that obviously went into this enterprise — the appellants were unable to uncover anything more closely related to the instant case than the examples cited in their brief. Also, one commences to wonder if the bases of the arguments relied upon are as solid as they appeared at first blush. On a third reading, it becomes clear that this brief is nothing more or less than an attempt to substitute clever, glib arguments for lack of fundamental constitutional justifications. A critical examination of each of the points reveals this inherent weakness.

A.

The first proposition advanced by petitioners is that "Congress devoted considerable attention to the question of procedures which should be followed by the Com-

mission" and in Section 102 of the Act, set forth all necessary requirements in connection with hearings. Subsequently, the Commission itself adopted rules which went beyond the terms of the Act itself, thus clearly showing that the so called rules provided by the Act were never considered complete or exclusive. However, in spite of this, petitioners argue that when Congress placed certain limitations on the procedures to be followed at hearings, it thereby signified that the Commission was free to reject all other safeguards of due process.

The argument that because one right has been safeguarded by law, all others are left to the discretion and mercy of the administrative agency, is one of the oldest and least tenable precepts of the bureaucrat. If the police are by law enjoined from the use of the rack to extract confessions, this argument would permit them to assert the right to use the rubber hose which had not been specifically excluded.

From the very first, our founding fathers were wary of this. In the act whereby the State of New York ratified the Constitution of the United States, an outspoken and clearcut warning was issued against this very argument. Realizing that the proposed Constitution denied certain powers to Congress, the New York Convention in its act of ratification provided:

> "And that those Clauses in the said Constitution which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed

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> either as exceptions to certain specified Powers, or as inserted merely for greater Caution." (House Document No. 398, 69th Congress (1927), Page 1035.)

This declaration was specifically made as a condition on ratification of the Constitution.

To bolster their claim of authorization by implication, petitioners cite affirmative statements by Representative Keating and Representative Seller, and a negative statement by Senator Talmadge. If the Congressional intent had been to authorize such a departure from recognized and established procedures, it is submitted that it could be established far more definitively than by the isolated remarks of only two members out of the four hundred thirty-five members of the House. The very paucity of authorities on this point demonstrates the lack of "careful and purposeful consideration by those responsible for enacting and implementing our laws." Hence, the most that could be derived from the information cited in petitioners' brief is that Congress evidenced no intent with regard to the points involved in this case.

B.

A considerable portion of petitioners' brief is devoted to a discussion of the House "fair play rules" and practices of Congressional committees in the conduct of hearings in connection with proposed legislation. This portion of the brief is based upon a bland assumption that the Civil Rights Commission is an arm of the Congress of the United States and entitled to all of the privileges

and prerogatives of a Congressional Committee. (see, Petitioners' Brief, p. 18, line 3.) It is an assumption contrary to fact. The Civil Rights Commission, as clearly stated in the Civil Rights Act, is nothing more or less than an agency "in the executive branch of the Government." As such, it is subject to all of the limitations and restrictions applicable to other administrative agencies. To warrant an exemption from such regulations, the Commission must show explicit authority therefor.

The interesting discussion of the practices of executive agencies found at Page 42 et seq of Petitioners' Brief, should be sufficient, in itself, to rebut the claim of immunity from the restrictions of due process. This argument commences with the following admission:

> "We have been unable to find any solid evidence as to the practice of such agencies in providing witnesses with the contents and sources of allegations against them." (Petitioners' Brief, Page 52, line 28 et seq.)

Another singular fact about this brief is that no cases are cited showing that the practices advocated have ever been judicially approved in connection with any executive agency. Petitioners have simply invoked the shopworn argument "silence gives consent."

C.

In the Court below, petitioners devoted a considerable amount of their energies to proving that the Administrative Procedure Act did not apply to the Commission. (Cf. Memorandum In Support of Motion For

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Summary Judgment, Sec. III, page 11 et seq.). The District Court was apparently convinced, because it refused to apply the Administrative Procedure Act. The Commission's principal objection to this Act was that in Sections 5 and 7 it specified rights of notice, confrontation and cross-examination in "every case of adjudication." The Act contained a clear definition of the term "adjudication." This definition was broad enough to cover an investigative hearing which might terminate in a declaration affecting complainants. (5 U.S.C. 1001).

Although they are still unwilling to acknowledge the applicability of the Administrative Procedure Act, petitioners now have adopted and advocate the test prescribed by Sections 5 and 7 of that act. They claim that the safeguards of due process are applicable only in instances of "adjudication." However, petitioners have not adopted the definition of "adjudication" as given in the Administrative Procedure Act. Rather, they contend that "adjudication" means the same as "sanction" as defined in that Act. Nothing could be more palpably erroneous.

After carefully studying the leading cases, respondents are firmly convinced that no easy formula or standard can be administered to determine when such safeguards apply. It is very clear that the term "adjudication" offers no magical solution.

If any doubt exists on this score all one need do is turn to the leading case — *Greene v. McElroy*. In a lengthy majority opinion, a short concurring opinion and

a lengthy dissenting opinion, the word "adjudication" is not even mentioned, much less used as a standard.

The closest thing to a reliable test that the Court has ever laid down is the above quoted rule of Greene, ". . . where governmental action seriously injures an individual, and the reasonablenes of the action depends on fact finding . . . ."

D.

Perhaps the most disturbing of all the arguments of petitioners' brief is the implication running through it that practices abhorrent to "due process" should be permitted if it can be shown that some analogous agency got away with such in the past.

Disregarding, for the moment, the great differences between the cited instances and the present case — isn't it alarming to hear a duly constituted Commission, created for the purpose of protecting our "civil rights", contending, in effect, that such rights should be limited by the narrowest construction ever given in the past? This is in direct conflict with the conception of "due process" as a "living principle."

Turning to the "documentation" of petitioners' brief, one finds that the cited instances of administrative deviation from "due process" are in no way comparable to the actions of the Commission.

The Roberts Commission was appointed in war time to investigate a matter directly affecting the security of

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the country. It was appointed under the War Power and the principles involved were high officers of the Army and Navy. It was the type of exceptional proceeding which "proves the rule" of the Greene case.

Moreover, the petitioners cite no cases holding that the Roberts Commission, or the other cited agencies had proceeded Constitutionally in such hearings.

CONCLUSION

It is, therefore, respectfully submitted that the petition for certiorari should be denied, and that the judgment of the district court affirmed.

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January 7, 1960.